MOTION FILED
JAN 7 1988

No. 86-863

In The
Supreme Court of the United States
October Term, 1987

Otis R. Bowen, Secretary of Health and Human Services,
Petitioner,

v.

Kenneth Kizer, Director of the California Department of Health Services, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION TO DISMISS AS MOOT

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This case concerns the validity of an amendment to California's Medicaid plan establishing an adult couple medically needy income level ("MNIL"). That income standard is set at 133 1/3% of the AFDC grant payable to a family of three people without other income or resources. In an administrative proceeding held pursuant to 42 U.S.C. § 1316(a), the Secretary disapproved the amendment, holding that, under § 1903(f) of the Social Security Act, 42 U.S.C. § 1396b(f), the State could not receive federal financial participation for an income standard in excess of 133 ⅓% of the AFDC grant for a family of two. The Ninth Circuit reversed. *Cubanski v. Heckler*, 781 F.2d 1421, *rehearing en banc denied*, 794 F.2d 540 (9th Cir. 1986). This Court granted certiorari. 55 U.S.L.W. 3569 (Feb. 24, 1987). The matter was argued and submitted on November 10, 1987.

In his reply brief in this Court, the Secretary noted that Representative Henry Waxman[1] had introduced a bill which, "if enacted, would permit California to amend its Medicaid plan in the manner at issue in this case." (Petitioner's Reply Brief at 8, n. 8). The bill to which the Secretary referred, § 4121 of H.R. 3188, 100th Cong., 1st Sess. (1987), provided:

> For purposes of section 1903(f)(1)(B) of the Social Security Act, for payments made to California on or after July 1, 1983, in the case of a family consisting only of two individuals both of whom are adults and at least one of whom is aged, blind, or disabled, the "highest amount which would ordinarily be paid to a family of the same size" under the State's [AFDC]

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[1]Representative Waxman is the chairperson of the Subcommittee on Health and the Environment of the House Energy and Commerce Committee. His subcommittee has jurisdiction over the Medicaid program.

> plan . . . shall, at California's option, be the amount determined by the State agency to be the amount of the aid which would ordinarily be payable under such plan to a family which consists of one adult and two children and which is without any income or resources. Section 1902(a)(10)(C)(i)(III) of the Social Security Act shall not prevent California from establishing (under the previous sentence) an applicable income limitation for families described in that sentence which is greater than the income limitation applicable to other families, if California has an applicable income limitation under section 1903(f) of such Act which is equal to the maximum applicable income limitation permitted consistent with paragraph (1)(B) of such section for families other than those described in the previous sentence.

The House of Representatives subsequently enacted this provision as § 4121 of H.R. 3545, the Omnibus Budget Reconciliation Act of 1987. The Committee Report explained that the purpose of the measure was to "clarify that the State of California has had, and continues to have, the option to set its MNIL for an adult couple at 133 ⅓ percent of the amount of the State's AFDC payment standard for a family of three with no income or resources." H.R. Rep. 100-391 100th Cong. 1st Sess. 485 (1987) (Appendix A, hereto, at 2). In the final version of the Omnibus Budget Reconciliation Act, Congress adopted the House provision verbatim. P.L. 100-203, 100th Cong., 1st Sess. (1987), § 4106 Appendix B, hereto). *See also* H.R. Rep. 100-495, 100th Cong., 1st Sess. (1987) (Conference Committee report) (Appendix C hereto).

A decision disapproving a state plan amendment is not self-executing, but is enforced by means of withholding federal financial participation either through an audit disallowance or through a nonconformity decision. *See gen-*

erally New Jersey v. Department of Health and Human Services, 670 F.2d 1262, 1268-1271 (3d Cir. 1981). In this case, Congress has deprived the Secretary's decision of any force or effect by guaranteeing California full federal financial participation for the cost of its adult couple MNIL. The OBRA provision, moreover, has retroactive as well as prospective effect. It applies to "all Federal matching payments made to California on or after July 1, 1983 for services provided to adult medically needy couples," H.R. Rep. 100-391, *supra*, at 485—that is, it is operative back to the date on which the State commenced applying its adult couple MNIL.[2] *Cubanski v. Heckler*, *supra*, 781 F.2d at 1423.

Thus, the Secretary may not disallow any claim for the federal share of California's expenses, past or future, based upon his predecessor's disapproval of the adult couple MNIL. This case is therefore moot, and must be dismissed. *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414-15 (1972); *Hall v. Beals*, 396 U.S. 45 (1969).

Respectfully submitted,

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[2]The committee report reiterates the language of the statute itself, which explicitly states that it applies to "payments made to California on or after July 1, 1983 . . ." (Appendix B).

APPENDIX A

H.R.Rep. 100-391, 100th Cong., 1st Sess. (1987), provided with respect to § 4121 of H.R. 3545:

Sec. 4121.—Medically needy income levels for certain 2-member couples in California

Under current law, States have the option of extending Medicaid coverage to the "medically needy." These are aged, blind, or disabled individuals or adults and dependent children who meet the categorical requirements under the Aid to Families with Dependent Children (AFDC) or Supplemental Security Income (SSI) programs but whose incomes or resources are too high to allow them to qualify for cash assistance benefits. In order to qualify for "medically needy" coverage, an individual must "spend down" by incurring medical expenses until these costs, when applied against the individual's income for the relevant accounting period, reduce that income below the State-established medically needy income level. Any medical expenses incurred after that point, if covered under the State Medicaid plan, would be paid for by Medicaid, until the beginning of a new accounting period, when the individual would have to repeat the "spend-down" process to re-establish coverage.

California has opted to cover the medically needy. In 1983, California adopted a medically needy income level (MNIL) for an adult couple. In accordance with a HCFA Regional Office Manual provision, California set the MNIL at 133⅓ percent of the AFDC cash grant to a family of three with no income. The State submitted a Medicaid plan amendment reflecting this change which HCFA dis-

approved on the grounds that the MNIL could not exceed 133⅓ percent of the AFDC cash grant to a family of two with no income. The State appealed the Secretary's disapproval, and the Ninth Circuit Court of Appeals properly reversed the Secretary, *Cubanski v. Heckler*, 781 F.2d 1421 (9th Cir. 1986). The Supreme court has granted the Secretary's request for *certiorari*.

California's MNIL for an adult couple is currently $825 per month. All but this amount of their monthly income must be used to pay for medical care. The $825 represents the amount these aged and disabled couples are allowed to use to cover their non-medical necessities, such as food, clothing, and shelter. Under HCFA's interpretation, the MNIL would drop to 133⅓ percent of the AFDC payment standard for a family of two with no income or resources, or $667 per month. About 14,600 aged or disabled couples would have to spend an additional $158 per month before receiving any Medicaid coverage. The Committee can see no justification for stripping these couples of the protections to which they are entitled under current law and practice and imposing additional cost-sharing burdens on them.

The Committee amendment would clarify that the State of California has had, and continues to have, the option to set its MNIL for an adult couple at 133⅓ percent of the amount of the State's AFDC payment standard for a family of three with no income or resources. The amendment would apply to all Federal matching payments made to California on or after July 1, 1983, for services provided to adult medically needy couples.

APPENDIX B

Section 4106, P.L. 100-203 (Omnibus Budget Reconciliation Act of 1987), 100th Cong., 1st Sess. (Dec. 22, 1987) provides:

Medically Needy Income Levels For Certain 2-Member Couples in California

For purposes of section 1903(f)(1)(B) of the Social Security Act, for payments made to California on or after July 1, 1983, in the case of a family consisting only of two individuals both of whom are adults and at least one of whom is aged, blind, or disabled, the "highest amount which would ordinarily be paid to a family of the same size" under the State's plan approved under part A of title IV of such Act shall, at California's option, be the amount determined by the State agency to be the amount of the aid which would ordinarily be payable under such plan to a family which consists of one adult and two children and which is without any income or resources. Section 1902(a)(10)(C)(i)(III) of the Social Security Act shall not prevent California from establishing (under the previous sentence) an applicable income limitation for families described in that sentence which is greater than the income limitation applicable to other families, if California has an applicable income limitation under section 1903(f) of such Act which is equal to the maximum applicable income limitation permitted consistent with paragraph (1)(B) of such section for families other than those decribed in the previous sentence.

APPENDIX C

H.R. Rep. 100-495, 100th Cong., 1st Sess. (1987) provides in relevant part:

Medically Needy Income Levels For Certain 2-Member Couples in California (Section 4121 of House Bill)

Present Law

For purposes of Federal matching, medically needy income levels can be no higher than 133 1/3 percent of the State's AFDC cash payment level for a family of the same size without any income or resources. California has based its medically needy income levels for the elderly and disabled on the AFDC payment standard for a family of three.

House Bill

Permits California, for payments made on or after July 1, 1983, to use a specified medically needy income level for families consisting of two adults, at least one of whom is aged, blind, or disabled. This level may not exceed the AFDC payment level for a three person family, consisting of one adult and two children, without any income or resources. The income limitation established for these families may be greater than that applicable for other medically needy families in California.

Senate amendment

No provision.

Conference agreement

The conference agreement follows the House bill.

Effective Date

The provision is effective upon enactment.